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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DARNELL HART, Defendant and Appellant.	H041534 (Santa Clara County Super. Ct. No. C1121185)

On the evening of November 28, 2011, Mark Koransky noticed that a number of items were missing from the San Jose home he shared with his two children. The missing items included cash, jewelry, four electric guitars, an amplifier, and other electronics. The guitars and amplifier were recovered from local musical instrument resale stores. Store employees testified to purchasing the items from defendant Darnell Hart. Police recovered other items, including the missing jewelry, from an apartment defendant shared with Marsha Koransky, Mark's estranged wife.[1] The Koranskys were in the process of getting a divorce and a restraining order required Marsha, an alcoholic, to stay away from the home where her husband and children lived.

Defendant sent Mark a letter from jail urging him to get the prosecutor to drop the charges against defendant. In exchange, defendant offered to provide information that Mark could use against Marsha in divorce and custody proceedings.

[1] We will refer to the Koranskys by their first names for the sake of clarity.

Defendant appeals from a judgment of conviction entered on jury verdicts finding him guilty of first degree burglary (Pen. Code, §§ 459, 460, subd. (a))[2]; concealing or withholding stolen property (§ 496, subd. (a)); four counts of selling and/or aiding in the sale of stolen property (§ 496, subd. (a)); and attempting to dissuade a victim or witness from prosecuting a crime (§ 136.1, subd. (b)(2)). On appeal, defendant seeks reversal of his conviction for attempted dissuading on the ground that the trial court prejudicially erred by instructing jurors that they could consider his in-custody status in connection with that count. He also requests remand to allow the trial court to determine whether his convictions for selling stolen property should be reduced to misdemeanors under Proposition 47. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant is Charged

The Santa Clara County District Attorney filed a seven-count first amended information on August 17, 2012. It charged defendant with first degree burglary (§§ 459, 460, subd. (a), count 1); concealing or withholding stolen property (§ 496, subd. (a), count 2); four counts of selling and/or aiding in the sale of stolen property (§ 496, subd. (a), counts 3-6); and attempting to dissuade a victim or witness from prosecuting a crime (§ 136.1, subd. (b)(2), count 7). The amended information further alleged that defendant had two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12) and two prior serious felony convictions (§ 667, subd. (a)), and that he had served four prior prison terms (§ 667.5, subd. (b)).

B. Evidence Adduced at Trial

The following evidence was adduced during four days of testimony at defendant's September 2012 jury trial.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

Mark testified that he and Marsha separated in October 2010, after 14 years of marriage. At that time, Marsha moved into a rehabilitation facility to receive treatment for alcoholism. When she left rehab, she moved in with a friend. Later, she moved to a residence on Copperfield Drive. In January 2011, a restraining order was issued requiring Marsha to stay away from Mark, their two children, and the family home.

When Mark arrived home from work on the evening of November 28, 2011, he noticed something out of place in the garage. There were no signs of forced entry, but Mark testified he had left the back sliding glass door unlocked. He soon realized a number of items were missing from the garage and from his bedroom, including jewelry, a watch, four Charvel guitars, an amplifier, a CD player, and other electronics. Mark valued the guitars at between $1,250 and $3,000 a piece. Each was unique: one had a rising sun design, one was black, another had tiger stripes, and the fourth had a snakeskin pattern. Cash Mark had left out for the nanny also was missing.

Mark called the police to report a burglary. He also attempted to locate the missing guitars by distributing flyers to local resale musical instrument stores. A few days after the burglary, he went to Guitar Center in Santa Clara where he saw two of his guitars. He located a third at a store called the Starving Musician in Santa Clara. Mark was able to confirm that the guitars were his using their serial numbers.

Santa Clara Guitar Center employee Nicholas Scarboro testified that defendant came into the store twice on November 28, 2011. The first time he was with a woman and identified himself as Darnell. The pair had two Charvel guitars they wanted to sell. The guitars were high-end and had "wild paint job[s]"—snakeskin and tiger stripes—so they stuck out to Scarboro. Defendant and the woman, whom Scarboro identified as Marsha based on a photograph, rejected the store's offer to buy the guitars for $275 each. Defendant returned later with a man and sold the guitars for $275 each. The man with the defendant, John Parker, produced identification as required to complete the sale.

Parker testified that a man named Darnell, whom he met in the parking lot of the Guitar Center, asked him to sell the guitars for him. Parker agreed. After selling the guitars, Parker cashed the check from Guitar Center and gave the money to Darnell.

An employee of the Starving Musician testified that defendant came into the store on November 30, 2011 to sell a black Charvel guitar and other equipment. Defendant was accompanied by a woman who provided identification, as required to complete the transaction. Starving Musician paid the woman, Elizabeth Jursa, $830 cash for the items ($700 for the guitar, $40 each for two monitors, and $50 for a mixer). Surveillance video from the store showing the transaction was played at trial.

Chandler Shaw, an employee of the Guitar Center in Gilroy, purchased Mark's fourth guitar, the Charvel with a rising sun design, on November 29, 2011. Shaw identified defendant as the man from whom he had purchased the guitar. According to Shaw, defendant came into the store with a woman Shaw identified from a photograph as Marsha. Defendant, who introduced himself as Darnell, had other equipment to sell, including an amplifier and a second Charvel guitar. The store purchased the amplifier for $40. Marsha provided identification to complete that transaction. Shaw testified that his manager chose not to purchase the guitars for the store, so Shaw purchased the rising sun guitar for himself for $200.

San Jose police officer Marc Beretta and several other officers went to an address on Copperfield Drive in San Jose on the evening of December 3, 2011. Defendant and Marsha were present. Searches of the home and of defendant's vehicle yielded some of the items stolen from Mark, including jewelry.

Mark testified that he received a letter from defendant postmarked February 13, 2012. He read portions of the letter aloud at trial, including the following: "Mark, I'm due in court on the 14th of February to enter a plea. I'm pleading not guilty. Mark, you have enough power to have your lawyer . . . contact the D.A. and have all charges dropped saying it was a mistake or whatever. Then I'll owe my freedom to you in a

sense, and I'll have no choice but to do what I gotta do to [repay] the favor. [¶] . . . [¶] . . . You can get your favor three different ways. Number one, I can testify to all of the stuff Marsha has said about you, wish [*sic*] upon you and plotted on you. [¶] . . . [¶] But since the first option is only hearsay, the second is two, once out, Marsha will be so happy. We'll celebrate. She'll drink, and she'll be ready to plot on getting money, and I'll have it on tape. Trust me. I can get her to tell me whatever she wants done to you. The last option, which I would hate to do but will do it is, three. If I had to I would take Marsha to Reno, marry her, and then provide you with a copy of the marriage license and marriage certificate, and you could divorce her without having to give her a dime. You keep the house, you keep all the property and you keep all the money. . . . Tell me what you want me to do, and we'll be done. And once it's done, if you choose to bless me financially, it will be cool. Talk to your lawyer, and if you want to have D.A. drop all charges, then I'll do whatever you need and want me to do. Mark, your divorce can be finalized in less than 45 days with my help. It's not you have the money and power to have me put in jail, which I don't want. So I can promise you I'll have Marsha on tape saying stuff, or I'll have a marriage certificate for you saying Marsha has married me. If I don't hear from you soon I'll know that you don't need me or my help. Darnell Hart."

C. Verdict, Sentencing, and Appeal

The jury returned guilty verdicts on all seven counts on September 28, 2012.

On October 1, 2012, the court found true the allegations that defendant had two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12) and two prior serious felony convictions (§ 667, subd. (a)) and had served four prior prison terms (§ 667.5, subd. (b)).

Defendant moved to strike his prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court granted that motion as to one prior strike conviction at a sentencing hearing on September 12, 2014. The court proceeded to sentence defendant as a "two-strike" defendant to a total term of 27 years, 4 months in prison. The court sentenced defendant to eight years (the midterm doubled) on

count 1; a term of 16 months (one-third of the midterm, doubled) on count 2, stayed pursuant to section 654; consecutive terms of 16 months (one-third of the midterm, doubled) on counts 3, 4, 5, and 6; a consecutive term of four years (the midterm doubled) on count 7; and two consecutive five-year terms for the prior serious felony convictions (§ 667, subd. (a)). The court struck the punishment for two prior prison term enhancements pursuant to section 1385, and stayed two other prior prison term enhancements.

Defendant timely appealed on October 1, 2014.

II. DISCUSSION

A. Claimed Instructional Error Does Not Require Reversal

The trial court instructed jurors that they could properly consider defendant's in-custody status for the "limited purpose" of "determining whether or not he is guilty of Count 7, a violation of Penal Code section 136.1(b)(2)."[3] Jurors were instructed to otherwise "completely disregard this circumstance . . . during your deliberations." Defendant contends that the trial court erred in giving that instruction because his in-custody status was irrelevant to the elements of the crime of attempted dissuading of a victim or witness. He analogizes the instruction to prison garb, saying it improperly emphasized his in-custody status to the jury.

[3] The instruction read, in full: "If you determine that the defendant was in custody when he wrote the letter received by Dr. Mark Koransky in February 2012, and admitted as an exhibit at trial, you may consider that fact for a limited purpose. You may only consider his custody status as one of the surrounding circumstances in determining whether or not he is guilty of Count 7, a violation of Penal Code section 136.1(b)(2). [¶] The fact that the defendant is or was in custody is not evidence as to any other charge and is not an indication of guilt. Do not speculate about whether the defendant is now in custody. You must completely disregard this circumstance in deciding the issues as to Counts 1 through 6. Except as instructed above, do not consider it for any purpose or discuss it during your deliberations."

1. Forfeiture

Defense counsel did not object to the instruction at trial. Accordingly, the People argue that defendant forfeited this claim. Defendant responds that section 1259 permits him to challenge the instruction on appeal.

Section 1259 provides, in relevant part, that a reviewing court "may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." In the context of section 1259, a defendant's substantial rights are affected where the trial court committed reversible error under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (See *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Thus, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice [under *Watson*] if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We shall assume the court erred in instructing the jury that it could consider defendant's in-custody status, and proceed to the prejudice analysis.

2. Defendant Fails to Establish Prejudice

Under *Watson*, reversible error exists where "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.) In this context, a "reasonable probability" is a reasonable chance, more than an abstract possibility; it need not be more likely than not. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

The question before us is what the "jury is *likely* to have done in the absence of the" challenged instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) "In making that evaluation, [we] may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a

different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Ibid*.)

"To prove the crime of dissuading a witness from prosecuting a crime in violation of section 136.1, subdivision (b)(2), the prosecution must establish that the defendant, with the specific intent to do so, dissuaded or attempted to dissuade a witness or victim from '[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.' " (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 229-230.) Here, defendant's letter encouraging Mark to persuade the prosecutor to drop the charges against defendant in exchange for information for use in Mark's divorce proceedings strongly supports the guilty verdict on count 7. Defendant submitted no evidence supporting a different outcome on that count. Defense counsel argued that the letter was a desperate plea for help. But defendant's desperation is not exonerating. And the help he sought was that Mark not only refrain from assisting in his prosecution, but actively seek to end that prosecution.

There is no reasonable probability the jury would have reached a result more favorable to defendant on count 7 absent the challenged instruction. Therefore, defendant's claim is forfeited. And even if that claim merited consideration, it would not require reversal given the lack of prejudice to defendant.

B. Proposition 47 Does Not Apply Retroactively

Defendant was convicted of four felony counts of selling stolen property, in violation of section 496, subdivision (a), and sentenced to 16 months in prison on each count. At the time defendant committed the offenses and was charged, convicted, and sentenced, selling stolen property in violation of section 496, subdivision (a), was a "wobbler," punishable as either a felony or misdemeanor. (Former § 496, subd. (a).) And the prosecution was permitted to plead and prove selling of stolen property as a felony regardless of the value of the stolen property. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.)

About two months after defendant was sentenced, on November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (Proposition 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014; see Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers. . . ." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).) "Proposition 47 also created a new resentencing provision: section 1170.18." (*Ibid.*) Under subdivision (a) of that provision, a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) Where a petitioner satisfies the criteria in section 1170.18, the court must recall the petitioner's felony sentence and resentence him or her "to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Selling stolen property, in violation of section 496, subdivision (a), is among the theft offenses amended by Proposition 47. As amended, section 496, subdivision (a), now provides that selling stolen property is a misdemeanor if the value of the property is less than $950 and the defendant "has no prior convictions" for an offense specified in section 667, subdivision (e)(2)(C)(iv)—which lists serious and violent felonies that are sometimes referred to as " 'super strike' offenses"—or for an offense that requires the defendant to register as a sex offender under section 290, subdivision (c). Selling stolen property remains a wobbler where the value of the stolen property exceeds $950. (§ 496, subd. (a).)

Defendant contends that Proposition 47 applies retroactively to defendants whose judgments were not final before its effective date. He requests a remand to allow the trial

court to determine the value of the stolen property and to reduce his convictions on counts 3 through 6 to misdemeanors if that value does not exceed $950. The People respond that Proposition 47 does not apply retroactively and note that defendant may seek resentencing by filing a petition pursuant to section 1170.18.[4]

As the People allude to, defendant is a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47. (§ 1170.18, subd. (a).) He therefore is entitled to petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) And if he satisfies the criteria in section 1170.18, the court must recall his felony sentences and resentence him "to . . . misdemeanor[s] . . . unless the court, in its discretion, determines that resentencing [defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Defendant seeks to circumvent the procedure set forth in section 1170.18, relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), to which we now turn.

The ordinary presumption is that statutes apply prospectively. (*People v. Brown* (2012) 54 Cal.4th 314, 323 (*Brown*).) Our Supreme Court announced an exception to that rule in *Estrada*: "When the Legislature has amended a statute to reduce the

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[4] The issue presented here—whether Proposition 47 applies retroactively to a defendant who was sentenced before its effective date but whose judgment was not final until after that date—is pending before our Supreme Court in *People v. Dehoyos*, review granted September 30, 2015, S228230. That case "presents the following issue: Does the Safe Neighborhood and Schools Act [Proposition 47] (Gen. Elec. (Nov. 4, 2014)), which made specified crimes misdemeanors rather than felonies, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?"
(<http://www.courts.ca.gov/documents/OCT2116crimpend.pdf>[as of 10/24/16].)
The court also has granted review in *People v. Delapena* (2015) 238 Cal.App.4th 1414, review granted October 28, 2015, S229010 [holding for lead case] and in *People v. Lopez* (2015) 238 Cal.App.4th 177, review granted October 14, 2015, S228372 [same].

punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*Brown*, *supra*, at p. 323, fn. omitted.) "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*).) Thus, "the *Estrada* rule reflects a presumption about legislative intent . . . ." (*Id*. at p. 656.) That "presumption does not govern when the statute at issue includes a 'saving clause' providing that the amendment should be applied only prospectively." (*Ibid*.) Nor does it apply where, despite the absence of an express savings clause, "other indicia of a contrary legislative intent" exist. (*People v. Nasalga* (1996) 12 Cal.4th 784, 793; *Conley*, *supra*, at p. 656 ["while [express savings clauses] unquestionably suffice to override the *Estrada* presumption, the 'absence of an express saving clause . . . does not end "our quest for legislative intent." ' "].)

The question for us, then, is one of the electorate's intent. In enacting Proposition 47, did voters intend for the reduced penalty provisions of Proposition 47 to be available outside the parameters of section 1170.18? We conclude they did not. The resentencing procedure set forth in section 1170.18 bears close resemblance to the resentencing procedure established by section 1170.126, added by the "Three Strikes Reform Act of 2012" (Three Strikes Reform Act or Proposition 36) enacted when the voters approved Proposition 36. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of Prop. 36, §§ 1, 6.) As noted, section 1170.18 allows eligible inmates, who are currently serving a sentence for a conviction of a felony or felonies and who would have been guilty of a misdemeanor if Proposition 47 had been in effect at the time of the offense, to seek resentencing by timely filing a petition for recall of sentence. (§ 1170.18, subds. (a), (b), (j).) Similarly, section 1170.126, subdivision (b), allows

eligible inmates, who are presently serving an indeterminate term of life imprisonment as third strike offenders under Three Strikes law (§§ 667, subd. (e)(2); 1170.12, subd. (c)(2)) for offenses that are not defined as serious and/or violent felonies (see §§ 667.5, subd. (c); 1192.7, subd. (c)) to seek resentencing under the ameliorative provisions of Proposition 36 by timely filing a petition for recall of sentence. Both section 1170.18 and section 1170.126 disqualify inmates from resentencing based on specified prior convictions.[5] Under both section 1170.18 and section 1170.126, the court receiving a petition for recall of sentence may decline to resentence an otherwise eligible petitioner if it determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.[6] (§§ 1170.18, subd. (b), 1170.126, subd. (f).)

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[5] Section 1170.18, subdivision (i), provides: "The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." Section 1170.126, subdivision (e), provides: "An inmate is eligible for resentencing if: [¶] . . . [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

[6] Under both provisions, the court may consider all of the following in exercising its discretion to decide the potential risk to the public of resentencing: "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes"; "(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated"; and "(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b); 1170.126, subd. (g).) Unlike section 1170.126, however, section 1170.18 explicitly defines the phrase "unreasonable risk of danger to public safety." (§ 1170.18, subd. (c).) The following issue is pending before the California Supreme Court: "Does the definition of 'unreasonable risk of danger to public safety' (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 ('the Safe Neighborhoods and Schools Act') apply to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?" (*People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676; see *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168 [holding for lead case]; *People v. Myers*

Recently, in *Conley*, the California Supreme Court addressed the retroactivity of Proposition 36. Given the parallels between Proposition 47 and Proposition 36, we find the court's analysis instructive.

The *Conley* court held that third strike offenders who were sentenced under the Three Strikes law before the effective date of Proposition 36, but whose judgments were not yet final as of that date, are not entitled to automatic resentencing under the reasoning of *Estrada*. (*Conley*, *supra*, 63 Cal.4th at pp. 651, 661-662.) In reaching that conclusion, the court was persuaded by the fact that Proposition 36 "is not silent on the question of retroactivity." (*Conley*, *supra*, at p. 657.) Rather, section 1170.126 extends the benefits of the Three Strikes Reform Act retroactively by creating a "mechanism that entitles all persons 'presently serving' indeterminate life terms imposed under the prior law to seek resentencing under the new law." (*Conley*, *supra*, at p. 657.) The court observed that while *Estrada* presumes an intent to apply ameliorative changes to all non-final sentences, section 1170.126 goes even further, "including even prisoners serving *final* sentences within the Act's ameliorative reach . . . ." (*Conley*, *supra*, at pp. 657-658.)

The court also found relevant the fact that the recall mechanism in section 1170.126 "makes retroactive application of the lesser punishment contingent on a

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(2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937 [same]; *People v. Garcia* (2016) 244 Cal.App.4th 224, review granted April 13, 2016, S232679 [same]; *People v. Lopez* (2015) 236 Cal.App.4th 518, review granted July 15, 2015, S227028 [same]; *People v. Sledge* (2015) 235 Cal.App.4th 1191, review granted July 8, 2015, S226449 [same]; *People v. Guzman* (2015) 235 Cal.App.4th 847, review granted June 17, 2015, S226410 [same]; *People v. Crockett* (2015) 234 Cal.App.4th 642, review granted May 13, 2015, S225198 [same]; *People v. Rodriguez* (2015) 233 Cal.App.4th 1403, review granted April 29, 2015, S225047 [same]; *People v. Aparicio* (2015) 232 Cal.App.4th 1065, review granted March 25, 2015, S224317 [same]; *People v. Payne* (2014) 232 Cal.App.4th 579, review granted March 25, 2015, S223856 [same]; *People v. Superior Court (Burton)* (2015) 232 Cal.App.4th 1140, review granted March 25, 2015, S223805 [same]; *People v. Superior Court (Williams)* (2015) 232 Cal.App.4th 1149, review granted March 25, 2015, S223807 [same]; *People v. Davis* (2015) 234 Cal.App.4th 1001, review granted June 10, 2015, S225603 [same].)

court's evaluation of the defendant's dangerousness . . . ." (*Conley*, *supra*, 63 Cal.4th at p. 658.) That limitation on retroactivity, designed to protect public safety, convinced the court that it could not "say with confidence, as [it] did in *Estrada*, that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review. On the contrary, to confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved section 1170.126: to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors." (*Id*. at pp. 658-659.) The court could "discern no basis to conclude that the electorate would have intended for courts to bypass the public safety inquiry altogether in the case of defendants serving sentences that are not yet final." (*Id*. at p. 659.)

Like Proposition 36, Proposition 47 "is not silent on the question of retroactivity," but rather expressly addresses that question in section 1170.18. (*Conley*, *supra*, 63 Cal.4th at p. 657.) Much like section 1170.126 in the case of Proposition 36, section 1170.18 creates a mechanism by which the benefits of Proposition 47 are extended retroactively. And like section 1170.126, section 1170.18 "strike[s] a balance between [the] objectives of mitigating punishment and protecting public safety by . . . making resentencing subject to the trial court's evaluation of whether, based on their criminal history, their record of incarceration, and other relevant considerations, their early release would pose an 'unreasonable risk of danger to public safety.' " (*Conley*, *supra*, 63 Cal.4th at p. 658; § 1170.18, subd. (b).) For these reasons, we cannot conclude that voters intended for defendants serving sentences that are not yet final to be able to obtain resentencing outside the confines of a section 1170.18 petition for recall of sentence and without the attendant public safety inquiry.

The ballot materials confirm that conclusion. The text of Proposition 47 stated that "[r]equir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety" was among the purposes and intents of the Safe Neighborhoods and Schools Act. (Voter Information Guide, *supra*, text of Prop. 47, § 3, subd. (5), p. 70.) And the rebuttal to the argument against Proposition 47 stated "*Proposition 47 does not require automatic release of anyone.* There is no automatic release." (*Id*., rebuttal to argument against Prop. 47 p. 39.) These materials evince an intent that any defendant seeking resentencing be required to do so pursuant to section 1170.18.

For the foregoing reason, the rule of *Estrada* is inapplicable here. However, the resentencing procedure established by section 1170.18 may be available to defendant. (See § 1170.18, subd. (j) [A petition for recall of sentence must be "filed within three years after the effective date of the act that added this section or at a later date upon a showing of good cause"]; cf. *Conley*, *supra*, 63 Cal.4th at p. 662, fn. 5.)

III. DISPOSITION

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

People v. Hart
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